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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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9 KYLE WILSON,

Case No. 3:18-cv-00160-HDM-CLB

10 Petitioner,

v.

ORDER

11 PERRY RUSSELL,¹

12 Respondent.
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14

15 Before the court for a final decision on the merits is a petition for a writ of habeas
16 corpus filed by Kyle Wilson, a Nevada prisoner. ECF No. 6. Wilson's petition contains
17 two claims for relief, one of which (Ground One) was dismissed as moot because the
18 relief available under the claim had already been granted by the state court. ECF No.
19 30. Wilson's other claim (Ground Two) alleges his conviction and sentence violate his
20 constitutional right to be free from double jeopardy. For the reasons set forth below
21 Ground Two lacks merit, so the petition will be denied.

22 I. BACKGROUND

23 After a 2013 jury trial in the Eighth Judicial District Court for Clark County,
24 Nevada, Wilson was convicted of burglary, battery with intent to commit a crime
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26 ¹ Because petitioner is currently housed in Northern Nevada Correctional Center, the warden of that facility, Perry
27 Russell, is substituted for Timothy Filson as respondent. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (noting
28 that the default rule is that the proper respondent is the warden of the facility where the prisoner is being held).

1 (robbery), battery, and attempted robbery. On direct appeal, the Nevada Supreme Court
2 affirmed the judgment of conviction. Wilson then filed a petition for writ of habeas corpus
3 in the state district court. The state district court determined that the battery conviction
4 violated the Double Jeopardy Clause and ordered it dismissed, but otherwise denied
5 relief. In 2018, the Nevada Court of Appeals affirmed that decision on appeal. Wilson
6 then filed his federal petition for writ of habeas corpus.

7 II. STANDARD OF REVIEW

8 The standard of review applicable to habeas corpus petitions seeking relief from
9 a state court judgment of conviction is set forth at 28 U.S.C. § 2254(d), provides as
10 follows:

11 An application for a writ of habeas corpus on behalf of a person in custody
12 pursuant to the judgment of a State court shall not be granted with respect
13 to any claim that was adjudicated on the merits in State court proceedings
unless the adjudication of the claim –

14 (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
15 determined by the Supreme Court of the United States; or

16 (2) resulted in a decision that was based on an unreasonable
determination of the facts in light of the evidence presented in the
17 State court proceeding.

18 A state court decision is contrary to clearly established Supreme Court
19 precedent, within the meaning of § 2254(d), “if the state court applies a rule that
20 contradicts the governing law set forth in [Supreme Court] cases” or “if the state court
21 confronts a set of facts that are materially indistinguishable from a decision of [the
22 Supreme] Court.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (first quoting *Williams v.*
23 *Taylor*, 529 U.S. 362, 405-06 (2000), and then citing *Bell v. Cone*, 535 U.S. 685, 694
24 (2002)).

25 A state court decision is an unreasonable application of clearly established
26 Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state court
27 identifies the correct governing legal principle from [the Supreme] Court's decisions but
28

1 unreasonably applies that principle to the facts of the prisoner's case.” *Id.* at 75. “The
2 ‘unreasonable application’ clause requires the state court decision to be more than
3 incorrect or erroneous. The state court's application of clearly established law must be
4 objectively unreasonable.” *Id.*

5 III. DISCUSSION

6 In Ground Two, Wilson contends his judgment of conviction violates the Double
7 Jeopardy Clause because battery with intent to commit robbery is a lesser-included
8 offense of attempted robbery.

9 The Double Jeopardy Clause of the Fifth Amendment provides that no person
10 shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S.
11 Const., Amdt. 5. The “central purpose of the Double Jeopardy Clause [is] to protect [a
12 defendant] against vexatious multiple prosecutions.” *United States v. Wilson*, 420 U.S.
13 332, 343 (1975). “An indictment is multiplicitous when it charges multiple counts for a
14 single offense, producing two penalties for one crime and thus raising double jeopardy
15 questions.” *United States v. Stewart*, 420 F.3d 1007, 1012 (9th Cir.2005). Where the
16 same act constitutes a violation of two distinct statutes, the test to determine whether
17 there are two offenses or only one for double jeopardy purposes is whether each
18 offense “requires proof of a fact which the other does not.” *See Blockburger v. United*
19 *States*, 284 U.S. 299, 304 (1932).

20 The Nevada Court of Appeals addressed the issue presented by Ground Two as
21 follows:

22 Multiple convictions for a single act do not violate the Double
23 Jeopardy Clause when “each offense contains an element not contained
24 in the other.” *Jackson v. State*, 128 Nev. 598, 607, 291 P.3d 1274, 1280
25 (2012) (quotation marks omitted) (applying the *Blockburger* test). Battery
26 with intent to commit robbery requires the “use of force or violence upon
27 the person of another,” see NRS 200.400(1)(a), while attempted robbery
28 does not require any contact with the victim, see NRS 200.380(1)
(requiring “force or violence *or fear of injury*” (emphasis added)). At the
same time, attempted robbery requires the attempt to unlawfully take
personal property, see NRS 193.330(1); NRS 200.380(1), while battery
with intent to commit robbery does not require any overt attempt to take

1 personal property, see NRS 200.400(2). Each crime therefore contains an
2 element the other does not. Accordingly, convictions for both crimes do
not violate the Double Jeopardy Clause.

3 ECF No. 24-22 at 3-4.

4 This court sees no flaw in the state court's application of the *Blockburger* test. To
5 convict Wilson of attempted robbery, the State was required to prove both the intent to
6 commit robbery and the performance of an overt act towards the commission of the
7 crime. See *Larsen v. State*, 470 P.2d 417, 418 (Nev. 1970) (defining elements of
8 attempt to commit a crime under Nevada law); ECF No. 20-2 at 21 (jury instruction
9 defining elements of attempt). The conviction for battery with intent to commit robbery
10 did not require proof of an overt act. See Nev. Rev. Stat. § 200.400; ECF No. 20-2 at 14
11 (jury instruction defining battery with intent to commit battery). Similarly, "battery
12 requires actual physical contact" while "robbery requires only fear of injury, with or
13 without contact." *Zgombic v. State*, 798 P.2d 548, 552 (Nev. 1990) *superseded by*
14 *statute on other grounds* as stated in *Steese v. State*, 960 P.2d 321, 324 n. 6 (Nev.
15 1998).

16 The state court's decision to reject Wilson's double jeopardy claim was neither
17 contrary to, nor an unreasonable application of, Supreme Court precedent, as no double
18 jeopardy violation occurred. 28 U.S.C. § 2254(d). Thus, Ground Two is denied.

19 IV. CONCLUSION

20 Wilson has not demonstrated that he is in custody in violation of his rights under
21 federal law. Therefore, his petition for a writ of habeas corpus is denied.

22 *Certificate of Appealability*

23 Because this is a final order adverse to the petitioner, Rule 11 of the Rules
24 Governing Section 2254 Cases requires this court to issue or deny a certificate of
25 appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within
26 the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v.*
27 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).
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1 Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner
2 "has made a substantial showing of the denial of a constitutional right." With respect to
3 claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists
4 would find the district court's assessment of the constitutional claims debatable or
5 wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
6 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
7 jurists could debate (1) whether the petition states a valid claim of the denial of a
8 constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

9 Having reviewed its determinations and rulings in adjudicating Wilson's petition,
10 the court declines to issue a certificate of appealability for its resolution of any
11 procedural issues or any of Wilson's habeas claims.

12 IT IS THEREFORE ORDERED that Wilson's petition for writ of habeas corpus
13 (ECF No. 6) is DENIED. The Clerk shall enter judgment accordingly and close this case.

14 IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

15 DATED THIS 20th day of May, 2021.

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UNITED STATES DISTRICT JUDGE
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